

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

5 DAVID A. DODD,) NO. CV-12-0522-LRS
6 Plaintiff,) ORDER RE DEFENDANTS'
7 v.) MOTION FOR SUMMARY JUDGMENT
8 JAMES W. MARSHALL AND CITY OF)
9 EAST WENATCHEE, sued in)
10 individual and official)
11 capacities,)
Defendants.)

12 This is a 42 U.S.C. Section 1983 action in which the
13 Plaintiff claims he was unlawfully arrested by a City of East
14 Wenatchee police officer who used excessive force upon him in
15 violation of his federal constitutional rights. On July 16, 2013,
16 Defendant City of East Wenatchee and James W. Marshall
17 ("Defendants") filed a motion for summary judgment. ECF No. 25.

18 The Plaintiff, a prisoner at Airway Heights Corrections
19 Center, filed a response (through counsel¹) in opposition to
20 Defendants' motion for summary judgment on August 16, 2013. ECF
21 No. 30. Plaintiff provided no separately filed statement of facts
22 in opposition to Defendants' motion for summary judgment.
23 Plaintiff provided a decision of a municipal court judge finding
24 lack of probable cause for the arrest of Plaintiff Dodd by
25 Defendant Officer Marshall. The motion is heard without oral
26 argument.

28 ¹Plaintiff was pro se until a notice of appearance was filed
on his behalf August 16, 2013, and after Defendants' Motion for
Summary Judgment was filed.

BRIEF BACKGROUND

2 This case was originally filed in Douglas County Superior
3 Court and removed to federal court pursuant to 28 U.S.C. §1446(a)
4 on August 28, 2012. Plaintiff asserts a civil rights claim under
5 42 U.S.C. §1983. Plaintiff alleges the following federal claims
6 against Defendants: 1) excessive force; 2) violation of due
7 process due to a lack of probable cause; 3) unlawful seizure; and
8 4) violation of plaintiff's freedom of speech. Plaintiff alleges
9 the following state claims against Defendants: 1) false arrest;
10 2) violation of due process (state constitution); 3) unlawful
11 seizure (state constitution); 4) violation of freedom of speech
12 (state constitution); and 5) negligent hiring/supervision.
13 Defendants assert entitlement to qualified immunity and request
14 that all claims be dismissed.

SUMMARY OF FACTS FROM EACH PARTIES' PERSPECTIVE

A. Defendants' Version of Facts

17 On June 9, 2010, Officer James Marshall observed Plaintiff
18 Dodd drive up to his location (at a stop sign near the Costco
19 Parking lot in East Wenatchee, Washington) and stop his truck
20 adjacent to the officer, in the wrong lane of travel. Plaintiff
21 was known to Officer Marshall from previous contacts and due to
22 his reputation among other officers. Plaintiff was known as a
23 volatile individual that had many contacts with law enforcement.
24 Plaintiff says Officer Marshall had passed him earlier in the
25 evening and turned around, however, he admits he doesn't know if
26 Officer Marshall looked at him when passing or not. Plaintiff was
27 not pulled over by Officer Marshall that evening prior to his
28 contact with the officer at the stop sign.

1 Plaintiff Dodd began yelling and cursing at Officer Marshall
2 about harassing him. Officer Marshall pulled forward so he could
3 get out of the car because he felt threatened by the sudden
4 encounter. Plaintiff sped off. Officer Marshall was concerned
5 about Plaintiff's behavior and the way he was driving, so he
6 followed. Plaintiff drove at a high rate of speed and did not
7 pull over when the officer turned on his overhead lights.
8 Plaintiff finally arrived at his home and got out of his car
9 yelling at the officer. Officer Marshall originally pulled out his
10 service weapon because of the demeanor and reputation of
11 Plaintiff, and held it at low ready. When Plaintiff failed to
12 obey instructions, the officer pulled out his taser weapon and
13 pointed it at Plaintiff. Plaintiff then complied and got on the
14 ground. Plaintiff was uncooperative and belligerent during the
15 contact. Plaintiff was taken to the jail and processed for
16 potential criminal charges. Plaintiff refused all testing and to
17 cooperate. ECF Nos. 25, 26, 27.

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19 **B. Plaintiff's Version of Facts in Opposition**

20 Plaintiff states generally that he "disagrees with
21 Defendants' statement of facts." ECF No. 30 at 2. Plaintiff
22 asserts that Officer Marshall never acted in a reasonable manner
23 towards Plaintiff and his stop of Plaintiff was unlawful and the
24 arrest unjustifiable. *Id.* Plaintiff concludes that a genuine
25 issue of material fact regarding Officer Marshall's conduct
26 clearly remains.

27 Plaintiff opposes this motion, though, without specifically
28 complying with LR 56.1(b) which requires the opposing party to

1 file with its responsive memorandum a statement, in serial
2 fashion, setting forth facts the party asserts create a genuine
3 issue of fact. Instead, Plaintiff's opposition relies entirely on
4 Judge Chancey C. Crowell's Memorandum Opinion of September 27,
5 2010. From Judge Crowell's opinion, Plaintiff argues the
6 following findings raise genuine issues of material facts:

- 7 • Judge Crowell concluded that, during the June 9, 2010 stop,
8 Officer Marshall did not observe Mr. Dodd fail to stop at any stop
9 sign, of which there was at least two, or fail to signal prior to
10 turning, of which there were at least five places where Mr. Dodd
11 was required to signal prior to turning.
- 12 • Officer Marshall[...] elected to pull Mr. Dodd over for
13 speeding, even though he was unable to pace the vehicle, could not
14 see the vehicle on all of Pace Drive or Highline and could
15 not see the vehicle on all of any of the streets thereafter ..."
- 16 • The judge further concluded that the stop was unlawful, that
17 it was more likely a pretext than not, and that "The Court is
18 forced to conclude that at a minimum the Officer lacked a
19 reasonable suspicion of criminal behavior or probable cause to
20 arrest ...
- 21 • Mr. Dodd's conduct [...] did not justify Officer Marshall's
22 arrest, an arrest made with a gun drawn even though the stop was
23 allegedly for speeding.
- 24 • Furthermore, a trained police officer should not be expected
25 to react in the manner of untrained citizen.

26 ECF No. 30 at 3.

27 **SUMMARY JUDGEMENT STANDARD**

28 Summary judgment is appropriate when it is demonstrated that

1 there exists no genuine issue as to any material fact, and that
 2 the moving party is entitled to judgment as a matter of law. Fed.
 3 R. Civ. P. 56(c). Under summary judgment practice, the moving
 4 party

5 [A]lways bears the initial responsibility of informing the
 6 district court of the basis for its motion, and identifying
 7 those portions of "the pleadings, depositions, answers to
 interrogatories, and admissions on file, together with the
 affidavits, if any," which it believes demonstrate the
 absence of a genuine issue of material fact.

8 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[W]here the
 9 nonmoving party will bear the burden of proof at trial on a
 10 dispositive issue, a summary judgment motion may properly be made
 11 in reliance solely on the 'pleadings, depositions, answers to
 interrogatories, and admissions on file.'" *Id.* Indeed, summary
 13 judgment should be entered, after adequate time for discovery and
 14 upon motion, against a party who fails to make a showing
 15 sufficient to establish the existence of an element essential to
 16 that party's case, and on which that party will bear the burden of
 17 proof at trial. *Celotex Corp.*, 477 U.S. at 322. "[A] complete
 18 failure of proof concerning an essential element of the nonmoving
 19 party's case necessarily renders all other facts immaterial." *Id.*
 20 In such a circumstance, summary judgment should be granted, "so
 21 long as whatever is before the district court demonstrates that
 22 the standard for entry of summary judgment, as set forth in Rule
 23 56(c), is satisfied." *Id.* at 323.

24 If the moving party meets its initial responsibility, the
 25 burden then shifts to the opposing party to establish that a
 26 genuine issue as to any material fact actually does exist.

27 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
 28 586 (1986). In attempting to establish the existence of this

1 factual dispute, the opposing party may not rely upon the denials
2 of its pleadings, but is required to tender evidence of specific
3 facts in the form of affidavits, and/or admissible discovery
4 material, in support of its contention that the dispute exists.
5 Fed. R. Civ. P. 56(e); *Matsushita*, 475 U.S. at 586 n. 11. The
6 opposing party must demonstrate that the fact in contention is
7 material, i.e., a fact that might affect the outcome of the suit
8 under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
9 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the
10 dispute is genuine, i.e., the evidence is such that a reasonable
11 jury could return a verdict for the nonmoving party, *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

14 In the endeavor to establish the existence of a factual
15 dispute, the opposing party need not establish a material issue of
16 fact conclusively in its favor. It is sufficient that "the
17 claimed factual dispute be shown to require a jury or judge to
18 resolve the parties' differing versions of the truth at trial."
19 *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary
20 judgment is to 'pierce the pleadings and to assess the proof in
21 order to see whether there is a genuine need for trial.'"
22 *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)
23 advisory committee's note on 1963 amendments).

24 In resolving the summary judgment motion, the court examines
25 the pleadings, depositions, answers to interrogatories, and
26 admissions on file, together with the affidavits, if any. Fed. R.
27 Civ. P. 56(c). The evidence of the opposing party is to be
28 believed, *Anderson*, 477 U.S. at 255, and all reasonable inferences

1 that may be drawn from the facts placed before the court must be
2 drawn in favor of the opposing party, *Matsushita*, 475 U.S. at 587
3 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)
4 (per curiam)). Nevertheless, inferences are not drawn out of the
5 air, and it is the opposing party's obligation to produce a
6 factual predicate from which the inference may be drawn. *Richards*
7 *v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal.
8 1985), *aff'd*, 810 F.2d 898, 902 (9th Cir. 1987).

9 Finally, to demonstrate a genuine issue, the opposing party
10 "must do more than simply show that there is some metaphysical
11 doubt as to the material facts. Where the record taken as a whole
12 could not lead a rational trier of fact to find for the nonmoving
13 party, there is no 'genuine issue for trial.'" *Matsushita*, 475
14 U.S. at 587 (citation omitted).

DISCUSSION

15 Defendants assert that pursuant to Local Rule 56.1(d), the
16 failure to file a statement of specific facts in opposition to a
17 motion for summary judgment allows the Court to assume the facts
18 as claimed by the moving party(s) exist without controversy.
19 Although Plaintiff did not succinctly follow Local Rule 56, the
20 Court finds that the facts alleged by Defendants exist with
21 controversy based on Plaintiff's responsive memorandum in
22 opposition.

23 The undersigned judicial officer finds that Plaintiff has
24 met his burden of demonstrating that genuine issues of material
25 fact exist with respect to the claims for constitutional
26 violations and 42 U.S.C. §1983. In particular, genuine issues of
27 material fact for trial with respect to Defendant Officer
28 Marshall's conduct remain. Further, because genuine issues of
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1 material fact exist with respect to whether a constitutional
2 violation was committed by the individual officer, there also
3 exists genuine issues of material fact with respect to the
4 existence of municipality liability on the part of the City of
5 East Wenatchee. To prevail on a civil rights complaint against a
6 local government under *Monell*,² a plaintiff must satisfy a
7 three-part test: (1) The official(s) must have violated the
8 plaintiff's constitutional rights; (2) The violation must be a
9 part of policy or custom and may not be an isolated incident; and
10 (3) a nexus must link the specific policy or custom to the
11 plaintiff's injury.

12 As to the related state law claims, Defendants have not
13 sufficiently briefed them for the Court to render a dispositive
14 ruling.

15 **CONCLUSION**

16 For the reasons discussed above, the Court **DENIES** Defendants'
17 motion for summary judgment (**ECF No. 25**).

18 **IT IS SO ORDERED.** The District Court Executive is hereby
19 directed to enter this order.

20 DATED this 23rd day of September, 2013.

21 ***s/Lonny R. Sukko***

22 _____
23 LONNY R. SUKCO
UNITED STATES DISTRICT JUDGE

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29 ²*Monell v. Dep't of Soc. Services*, 436 U.S. 658, 690-92
(1978).
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